

## September 14, 2021, City Council Agenda Comments

The following comments on items on the Newport Beach City Council [agenda](#) are submitted by:

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### ***Item SS4. Inclusionary Housing Ordinance Overview and Considerations***

I would hope this study session is used for the purpose the name implies: namely, as an opportunity for the Council and public to become *informed* about a subject, *without* being rushed into making decisions about it.

Unfortunately, in recent experience, most study session items end with staff posing a series of prepared questions to the Council, regarding which decisions are expected and votes taken, or at least “direction” sought by staff. Although sometimes referred to as “straw polls,” these votes generally represent the City’s final action on the matters queried.

Since there is usually, as in this case, no staff report or background information provided prior to the study session, and since neither the Council nor the public knows in advance what questions will be asked, this is a poor way to make public policy.

It is also in questionable compliance with the spirit, if not the letter, of the Brown Act.

It would be much better for all questions to be asked and all direction to be given at a separate, later meeting, after the Council and public have had a chance to thoughtfully digest and further investigate the material studied, and with the matters to be resolved announced on that later meeting’s agenda and in its attached materials.

### ***Item IV.B. CONFERENCE WITH LEGAL COUNSEL ANTICIPATED LITIGATION – INITIATION OF LITIGATION (Government Code § 54956.9(d)(4)): 1 matter***

I greatly appreciate staff’s effort to describe on the agenda what the “1 matter” is: an amicus brief being requested by the City of San Diego.

It may not be entirely clear from that description, but a decision has already been rendered in the Appeals Court case ([D076228](#)), and that decision has evidently been appealed by the City of San Diego to the [California Supreme Court](#), where, since a filing on August 18, it has become case S270451.

Apparently the higher court will be considering whether to accept the appeal and, if so, what issues need to be decided on appeal? While the agenda description suggests this has to do with “*interpretation of the five (5) mile per hour speed limit for vessels set forth in Harbor Code Section 655.2(a)*” – which limits our City has long wished could be stated in “knots” – the lower court case seems to have had more to do with the conditions under which safety personnel are required to adhere to that limit. Does Newport Beach staff have an opinion about that? And what, exactly, is San Diego expecting from us?

## ***Item 1. Minutes for the August 24, 2021 City Council Regular Meeting***

The passages shown in *italics* below are from the [draft minutes](#) with suggested corrections shown in ***strikeout underline*** format. The page numbers refer to Volume 65.

**Page 111**, Item XII, Council Member Brenner, bullet 2: “*Utilized slides to announce the September 10, 2021 Movie in the Park, Raya and the Last Dragon, and the ~~Sherwin Sherman~~ Gardens Annual Garden Party on August 28, 2021*”

**Page 111**, Item XII, Council Member O’Neill, bullet 2: “*Reminded the public of the 25 mph- speed limit with school starting*” [delete period after “mph”]

**Page 114**, last paragraph: “*Council Member Blom indicated that Council hears residents’ voices, ..., **Council speaks for the residents**, and ...*”

[**comment:** I believe this is an accurate rendering of what was said, but for the Council’s information: I am a resident. My opinions are my own. I have never authorized the Newport Beach City Council or any other governmental body to “speak for” me on any matter, especially on matters outside its jurisdiction.

In my opinion, the Newport Beach City Council (a majority of whose members I never voted for) speaks only for itself and for the California municipal corporation calling itself the “City of Newport Beach.”

Please do not attribute *your* opinions to me or to any other resident without our permission to do so.]

**Page 118**, paragraph 4: “*In response to Council Member Blom’s question, Mr. Sherwin advised that ~~Visit Newport Beach’s Newport Beach & Company’s~~ fees of \$1.9 million are overhead costs, and the Board and City staff review the fees and costs.*” [see [video](#) at 2:23:55]

**Page 121**, Item 20, paragraph 4: “*In response to Council Member Dixon’s questions, Landscape Manager Pekar clarified that the appeal concerns two Special Trees on Ashford Lane and noted that additional ~~trees~~ **Special Trees** are located on ~~Ashford~~ **Glenwood** Lane.*”

[? see [video](#) at 3:40:25. It is not clear if the question was about additional *special* neighborhood trees or additional *trees in general*. If it was the latter, the minutes are correct as drafted. Mr. Pekar said there were additional *trees* on Ashford Lane, but the other *special* ones had addresses on Glenwood Lane (with the street name changing at the “knuckle,” a 90-degree turn in the road, where the two in question are located).]

**Page 123**, paragraph 3: “*Shanel Arnold noted that **building a new home or** relocating utilities away from trees requires 3-feet of excavation, and one of the trees has grown around a water meter access.*”

[see [video](#) at 4:38:25. It was Ms. Arnold’s contention (correct or incorrect?), here and earlier in the hearing, that whenever a home in Newport Beach is demolished and rebuilt, the City requires the entire lot to be excavated to 3 feet and refilled.]

**Page 123**, Item 21, paragraph 2: “Michelle Black, representing Stop Polluting Our **Newport's Newport** (SPON), utilized a presentation to discuss the statutory interpretation, Charter Section 423 (“Greenlight”), the Director’s Determination as a project, the Coastal Act, required findings, finality of Council’s direction, and the General Plan Update.”

### **Item 7. Resolution No. 2021-74: Approving Revisions to City Council Policy H-1 Recommended by the Harbor Commission**

This item is disturbing, and may contribute to the belief of many that in Newport Beach, public policy is set by City staff rather than by the people.

As recounted in the staff report, the Council asked the people, through their Harbor Commission, to recommend changes to Policy H-1. After much deliberation and public debate at multiple meetings about the fine points of the wording of the policy, sometimes overruling the subcommittee assigned to the task, the Harbor Commission made a recommendation on a 5-0 vote at its July 14, 2021, meeting.

While it would be helpful for the Harbor Commission to adopt the practice of the Planning Commission of presenting its recommendations to the Council in the form of attachments to signed resolutions so the Council members know exactly what was reviewed and recommended, the Harbor Commission did not do so on July 14. So, we have to rely on the [version of Policy H-1](#) presented in the [agenda packet](#) and any changes to that reflected in that day’s [minutes](#).

As explained in the staff report, instead of presenting the Harbor Commission recommendation to the Council for its consideration and possible approval, City staff has taken it upon themselves to make changes “related to formatting for consistency with other Council policies.” However, they have not confined themselves to formatting, but have instead completely rewritten the text reviewed by the Commission, with the results placed on the Council consent calendar for adoption with no further debate.

Although we are told the only substantive change is that an “and” has been changed to an “or,” we are not provided a redline to show what has been changed. Instead, we assured that two of the Harbor Commissioners have been privately convinced staff’s changes were “substantive in nature.”

But there must be more to it than that, for despite the Council’s usual wish to keep policies as concise as possible, the 596 words reviewed and recommended by the Harbor Commission have grown to 690 words recommended by staff. And since the interpretation of regulations often hinges on the tiniest subtleties of wording, there is no guarantee that none of the other five Harbor Commissioners would be equally happy with the changes.

The resolution is certainly misleading in suggesting the Council is adopting something recommended by the Commission on a 5-0 vote. More likely, five of the Commissioners have never seen what is being put up for adoption, much less publicly reviewed or recommended it.

As to the one change highlighted in the staff report, changing “and” to “or” in requiring that “*The existing pier or float was previously permitted to encroach bayward beyond the pierhead line*”

*and or is in substantial conformance with the existing City-issued permit,”* the Council should be aware the “or” eliminates the requirement there is an existing permit allowing encroachment. In fact, if that is the Council’s intent and the Council wishes to eliminate superfluous words, the entire first part could be eliminated since it is more restrictive than latter and adds nothing to it. That would reduce this requirement to: *“The existing pier or float ~~was previously permitted to encroach bayward beyond the pierhead line and~~ is in substantial conformance with the existing City-issued permit.”*

More generally, when changes to City codes or Council policies are being considered, it is customary for a redline to be presented so the Council and the public can easily see and consider what is being changed – whether or not a board, commission or committee has recommended the changes.

Here we have none. The assurances that *“The recommended revisions give the Harbor Commission more flexibility and discretion to approve structures that were not built exactly in accordance with an existing permit, but have extended bayward beyond the pierhead line for some time”* and *“The recommended revisions also give staff more authority to approve structures that are being replaced with a structure of the same square footage or less, and of a substantially similar configuration”* really don’t cut the mustard. Those tell us the *intent* of the changes. They don’t tell us *what* was changed so others can verify those changes accomplish the stated intent and nothing more.

As the substance, the proposed Part II (page 7-7) doesn’t make a lot of sense. In a policy devoted to going beyond pierhead lines, it deals with permits that don’t go beyond pierhead lines. And for projects other than reconstruction, such as an entirely new pier, where one would hope the strongest regulations would be enforced, it instead defers to *“the applicable provisions of Title 17,”* without any clarity as to what that means.

### ***Item 10. Resolution No. 2021-82: Supporting Gypsum Canyon Veterans’ Cemetery***

Like several recent Council resolutions, this strikes me as something outside the scope of the Council’s jurisdiction, as well as a matter on which no independent local analysis of the pros and cons of the issue has been made, presented or debated. In this particular case, I am unable to find any explanation in the staff report of why the Council’s support is needed, or by whom.

### ***Item 11. Resolution No. 2021-83: Ford Road Overnight Parking Restrictions***

Does the City maintain a comprehensive list of: (1) the streets on which the Council has authorized parking restrictions, (2) the resolutions imposing those restrictions, and (3) the current status of those resolutions (active, superseded or repealed)?

The present resolution cites NBMC [Sec. 12.44.160](#) (Prohibited Night Parking) for its authority, but one might wonder why Sec. 12.44.160, allowing imposition, by resolution, of no-parking in the hours between six p.m. and before six a.m., exists? For it seems completely redundant with

[Sec. 12.44.150](#) (Prohibited Parking), which allows the Council to, by resolution, prohibit parking at *any* hours of the day it chooses (including, it would seem, ones between six p.m. and before six a.m). In that regard, the last resolution citing the more general Sec. 12.44.150 for its authority ([Resolution No. 2016-100](#)) seems to have done so erroneously, for it imposed not a no-parking rule, but rather a 1-hour time restriction whose authority comes from [Subsec. 12.44.010.E](#).

Is some cleanup needed in this area of the confusion that often arises when our codified ordinances allow themselves to be extended by less-accessible resolutions?

### ***Item 15. Civic Center Chiller Maintenance and Repair – Amendment No. 1 to Maintenance and Repair agreement with Enviser Inc. (C-8674-1)***

California Government Code [Section 54954.2](#) requires the agenda for a public meeting to contain “a *brief general description of each item of business to be transacted or discussed at the meeting.*”

The notice of this item in the present agenda uses abbreviations whose meaning becomes known with certainty only if one reads the associated staff report, which should not be necessary to understand the general nature of the business to be transacted. While many may know “HVAC” stands for “Heating, Ventilation and Air-Conditioning,” I would guess only a few will be able to decipher “NTE” as an abbreviation for “not to exceed.”

Such confusion arises when the agenda blindly copies the title and recommendation from the staff report, in which the abbreviations and other information necessary to understand the nature of the item is often explained in the Abstract preceding the Recommendation.

Should the persons preparing staff reports be encouraged to ensure the Title and Recommendation, when read by themselves, provide an understandable description of the matter to be discussed?

### ***Item 16. Approval of Grant Agreement with Trellis International***

The notice of this item in the agenda, again obtained by blindly copying the title and recommendation from the staff report, seems wholly inadequate to inform the public as to what the item is about. No explanation whatsoever is provided of who Trellis International is or what the grant to them might be for.

The full explanation of the program in the staff report seems, by contrast, generally adequate. However, since the homeless volunteers providing services to the City will not be paid for their labor, it is not totally clear what the grant funds will or can be used for. Section 3 of the grant agreement (page 16-5 of the staff report) restricts expenditures to “Approved Uses,” but then defers to Exhibit A (page 16-13) for a list of them. Exhibit A provides no clear list of approved uses that I can find, but only a description of work that the volunteers might perform.

The Abstract (page 16-1) implies the funds will be used for “supervision, transportation and oversight of the volunteers,” but I see no clear restriction to that in the proposed Agreement.

### ***Item 17. Acceptance of the State of California Office of Traffic Safety Selective Traffic Enforcement Program Grant PT22042***

The abstract for this item found in the staff report (“*The Newport Beach Police Department (NBPD) seeks acceptance of a grant totaling \$270,000 from the State of California, Office of Traffic Safety (OTS) to fund a Driving Under the Influence (DUI) Enforcement and Awareness Program, Traffic Safety Enforcement Operations, and DUI Sobriety Checkpoints*”) provides a much more concise and informative explanation of what is being requested of the Council than does the agenda notice.

### ***Item 25. Resolution No. 2021-84: An Additional Extension of Emergency Temporary Use Permits (PA2020-069)***

Much about the City’s Emergency Temporary Use Permit program puzzles me.

As indicated in the proposed resolution, ETUPs were created by Emergency Ordinance No. 2020-005 (page 25-7 of the present staff report). By its own terms (Section 7, page 25-11), the ETUPs granted under that ordinance expired 14 days after the termination of the ordinance, which (although not mentioned in the resolution or report) happened when, with [Item 15](#) on June 22, 2021, the Council declared the emergency in Newport Beach to have ended.

Yet permits that took an emergency ordinance to authorize can somehow be extended by a non-emergency resolution after the emergency has ended, as was done on June 22 (with [Item 20](#) on June 8, extending the ETUPs through September 6), and again with this item, extending them through December 31. That seems strange. And one has to wonder if our being a week beyond the September 6 termination, as previously extended, means some ETUPs have indeed expired and aren’t being retroactively “extended”?

It should also be noted that not a single request for a normal Limited Term Permit has come before the Zoning Administrator at a public hearing.

Beyond that, the proposed Resolution No. 2021-84 (which has not been provided in a machine readable format) contains some odd language. In particular, Section 2 on page 25-5 says “*Outdoor dining design and processing guidelines will be developed to ensure permanent outdoor facilities are aesthetically integrated and do no negatively impact surrounding uses.*”

Who does the resolution authorize to develop these guidelines? City staff on their own?

Who authorized permanent outdoor facilities?

I thought the resolution was about *limited* term permits and about more than restaurants.

***Item 26. Resolution No. 2021-85: Lido Isle Community Association Request for Waiver of City Council Policy L-6 and Associated Encroachment Permit Fees (Encroachment Permit No. N2021-0425)***

The staff report is unclear about the plan to power this lighted holiday display.

Recommendation (c) says it will be “with power provided from a City outlet” and the discussion on page 26-2 says “The HOA’s encroachment agreement submittal includes a request to allow the HOA to power its holiday decorations from a City of Newport Beach (City) power source on the bridge” (at an estimated cost, according to the Funding section, of “up to \$100 per holiday season”).

However, the LICA letter on page 26-22 requests permission to pay the City \$6,406 to add outlets to the bridge and mentions a drawing. But while the first proposed condition of approval on page 26-20 is that “The Project shall be in substantial conformance with the approved plans and renderings and [sic] dated with the date of this approval” no plan for the outlets is provided.

While slightly off-topic, this request for an encroachment agreement for holiday decorations raises the question of what has become of those from the Corona del Mar Business Improvement District? When that BID was dissolved (see end of Discussion section of [Item 4](#) on June 22, 2021), it was understood their decorations were being donated to Visit Newport Beach for display somewhere in the City. Has VNB requested a similar encroachment agreement?

As to LICA, it should be understood they have other encroachment agreements for non-holiday improvements, including most recently a [C-8665-1](#), apparently approved by City staff in April. And more significantly, they have a [C-3273](#) “lease” approved by Council in 1999, that allows the HOA to privatize the bayfront public street ends on the island in return for maintaining the landscaping. In my view, that is an improper use of public land.